Supreme Court, U.S.
FILED
SEP 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1737 (a)

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN COLLEGE OF PHYSICIANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI
Filed May 2, 1985
CERTIORARI GRANTED JULY 1, 1985

4 pp's
Folders

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UNITED STATES CLAIMS COURT

No. 415-82-T

THE AMERICAN COLLEGE OF PHYSICIANS

v.

THE UNITED STATES

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
Aug 17 1982	Filing fee of $10 paid by plaintiff.
Oct 14 1982	Notice of assignment to Chief Judge Alex Kozinski filed. Copy to parties.
Oct 15 1982	Defendant's motion for extension of time (to November 30, 1982) to file its answer, etc. filed. Service by mail: 10/15/82. ALLOWED; OCT 15, for 30 days only.
Oct 20 1982	Order of the Chief Judge governing proceedings before trial filed. Copy to parties.
Nov 15 1982	Defendant's motion for enlargement of time (to DEC 15 1982) to respond to the complaint filed. Service by mail: NOV 15 1982. ALLOWED; NOV 17 1982.
Dec 15 1982	Defendant's answer filed. Service by mail: DEC 15 1982.
Jan 17 1983	Notice to counsel filed. Copy to parties.
Jan 17 1983	Amended Order governing proceedings before trial filed. Copy to parties.
Feb 15 1983	Defendant's motion for enlargement of time (to APR 16 1983) to complete discovery filed. Service by mail: FEB 15 1983. ALLOWED FEB 16 1983. No further enlargements. See order of 1/17/83, Paragraph II(f).
Mar 24 1983	Plaintiff's motion for extension of time (to April 28, 1983) to answer defendant's interrogatories, Set. No. 1 filed. Service by mail: 3/23/83. DENIED. Counsel is directed to read the Court's Orders and comply with

	them strictly, etc.: MAR 28 1983. See endorsement on original motion.
Mar 30 1983	Defendant's opposition to plaintiff's motion for enlargement of time filed [by leave of the Judge]. Service by mail: 3/28/83.
Apr 12 1983	Defendant's motion for order compelling answers to interrogatories and response to request for production of documents filed. Service by mail: APR 12 1983. DENIED as Moot: MAY 6 1983.
Apr 25 1983	Order scheduling pretrial conference filed. Copy to parties.
May 5 1983	Defendant's motion for leave to withdraw or have denied as moot motion for order compelling answers to interrogatories and response to request for production filed. Service by mail: MAY 5 1983. ALLOWED: MAY 6 1983.
May 26 1983	Stipulation of facts filed.
May 26 1983	Pretrial list of exhibits of plaintiff filed. Service by mail: 5/26/83.
May 26 1983	Pretrial list of witnesses of plaintiff filed. Service by mail: 5/26/83.
May 26 1983	Pretrial memorandum of contentions of fact and law filed. Service by mail: 5/26/83.
May 26 1983	Defendant's submission in compliance with the amended order governing proceedings before trial filed. Service by mail: 5/26/83.
Jun 14 1983	Order of the Chief Judge allowing plaintiff to file pretrial brief (with response time according to normal schedule for dispositive motions under Rule 83.2), directing parties to file joint memorandum before the trial, and setting case for trial filed. Copy to parties.
Jun 21 1983	Transcript of proceedings (1 volume) taken at Washington, D.C. on June 2, 1983 filed. Notice to parties.
Jul 14 1983	Defendant's motion to vacate trial date, or to set briefing schedule [to order that no further briefs are to be filed after defendant's response to plaintiff's pretrial brief] filed. Service by mail: 7/14/83.
Jul 22 1983	Plaintiff's pretrial brief filed. Service by mail: 7/22/83.

Jul 29 1983	Plaintiff's response to defendant's motion to vacate trial date, or to set briefing schedule, filed. Service by mail: 7/28/83.
Aug 8 1983	Defendant's reply in support of its motion to vacate trial date, or to set briefing schedule filed. Service by mail: 8/8/83.
Aug 15 1983	Judge's order filed. [Defendant to file brief on AUG 22, 1983; Pltf's reply on SEPT 1, 1983; deft's reply on SEPT 12 1983; with hand delivery required.] Copy to parties.
Aug 22 1983	Defendant's trial brief filed. Service by mail: 8/22/83.
Aug 26 1983	Transcript of proceedings (1 volume) taken at Washington, D.C., on August 11, 1983 filed. Notice to parties.
Sep 1 1983	Plaintiff's reply brief filed. Service: 9/1/83.
Sep 8 1983	Defendant's motion for leave to substitute corrected copies of brief filed. Service by mail: SEP 8 1983. ALLOWED: SEP 12 1983.
Sep 12 1983	Corrected copy of defendant's trial brief filed. Service by mail: 8/22/83.
Sep 12 1983	Defendant's reply brief filed. Service by mail: 9/12/83.
Sep 14 1983	Plaintiff's statement of issues in dispute filed [by leave of the Judge].
Oct 3 1983	Transcript of proceedings (1 volume) taken at Washington, D.C. on September 14, 1983; together with plaintiff's exhibits 1 through 13; and defendant's exhibits 101 through 112 filed. Notice to parties.
Oct 21 1983	Opinion of the Chief Judge filed. Copies to parties.
Oct 24 1983	Judgement entered that the complaint is dismissed, with costs to the prevailing party. Copy to parties.
Dec 20 1983	Plaintiff's notice of appeal filed. Copy to defendant and CAFC. $70 filing fee paid.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 84-715

THE AMERICAN COLLEGE OF PHYSICIANS, APPELLANT

v.

THE UNITED STATES, APPELLEE

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS AND ORDERS
	COUNSEL FOR THE APPELLANT: John B. Huffaker COUNSEL FOR THE APPELLEE: Michael L. Paup, W.C. Rapp, Robert A. Bernstein COUNSEL FOR THE AMICUS CURIAE: Robert A. Saltzstein
December 30 1983	1. Certificate of Interest filed by appellant. (bam)
February 13 1984	2. Appellant's motion for transmission of trial exhibits to Court, filed. (ejc) *GRANTED:* February 15, 1984. (ejc)
February 15 1984	Received Plaintiff's Exhibits 1-12 and Defendant's Exhibits 101-112 from Claims Court. (exhibits in one box in storage) (ejc)
February 21 1984	BRIEF FOR APPELLANT/SEPARATE APPENDIX, filed. (SD-2/21-M) scg
April 2 1984	BRIEF FOR APPELLEE, filed. (SD-4/2-M) (ejc)
April 19 1984	REPLY BRIEF FOR APPELLANT, filed. (SD-4/18-M) scg
May 8 1984	THE PLAINTIFF'S EXHIBITS WERE USED IN ORAL ARGUMENT AND THE JUDGES ON THE PANEL KEPT THREE MAGAZINES FROM THE PLAINTIFF'S EXHIBITS. pjt

May 8 1984	ARGUED & SUBMITTED, before Baldwin, Smith & Nies, JJ.
Sept. 17 1984	Judgment reversed. Opinion by Smith, Circuit Judge. Separate opinion by Nies, Circuit Judge, concurring-in-part. pjt
October 1 1984	3. Appellee's motion for an extension of time (to and including October 31 1984) to file its petition for rehearing, filed. (SD-9/9/27-M) (ejc) *GRANTED:* OCTOBER 4, 1984.
October 31 1984	PETITION FOR REHEARING & SUGGESTION FOR REHEARING EN BANC FOR U.S., filed.
October 31 1984	4. Motion of American Business Press for leave to file a brief as amicus curiae in support of suggestion of United States for rehearing en banc, filed. (with affidavit in support) (SD-10/31-M) (ejc) *GRANTED:* November 2, 1984. (ejc) (per #25)
November 2 1984	BRIEF OF AMICUS CURIAE AMERICAN BUSINESS PRESS IN SUPPORT OF APPELLEE'S SUGGESTION FOR REHEARING EN BANC, filed. (SD-10/31-M) (ejc)
November 5 1984	5. Certificate of Interest filed by amicus curiae. (bam)
December 5 1984	Petition for rehearing denied and suggestion for rehearing in banc declined.
December 13 1984	MANDATE ISSUED TO THE CLAIMS COURT. (rs)
January 15 1985	Exhibits returned to the Claims Court by hand this date. (rs)
February 27 1985	6. Copy of letter to DOJ extending the time for filing petition for writ of certiorari to the Supreme Court to and including May 4, 1985, received. (ejc)
May 3 1985	PETITION FOR WRIT OF CERTIORARI IN U.S. SUPREME COURT (84-1737), FILED. (bam) *GRANTED:* 7/1/85.(bam)

IN THE UNITED STATES COURT OF CLAIMS

Docket No. 415-82 T

THE AMERICAN COLLEGE OF PHYSICIANS, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

PETITION

To the Honorable Chief Judge and Associate Judges of the United States Court of Claims.

1. Plaintiff herein, American College of Physicians, Inc., is a Delaware non-profit corporation located at 4200 Pine Street, Philadelphia, PA 19104.

2. Plaintiff brings this action to recover from the United States of America, Defendant herein, Federal income taxes in the amount of $55,965 erroneously and illegally collected for the calendar year 1975, or such other amount as the Court may determine to be lawfully due, together with interest thereon according to law.

3. This suit and the cause of action herein set forth arise under the Internal Revenue Code of 1954, as amended (26 U.S.C. §1 *et seq.*) (the "Code"), and the regulations promulgated thereunder. This suit is brought pursuant to, and within the period prescribed by, such Code and regulations for the recovery of Federal income taxes erroneously, illegally and wrongfully assessed and collected under the Code, together with interest thereon. This Court's jurisidiction is founded upon Title 28, United States Code, Section 1491.

4. Plaintiff is and always has been the sole and absolute owner of the claim herein presented. No transfer or assignment of such claim or any part thereof has ever been made. No action on this claim has been taken before the Congress of the United States or before any Department of the Government other than action before the Treasury Department as hereinafter described. No other suit or process by Plaintiff or any assignee is pending in any other court on this claim.

5. Plaintiff timely filed its income tax return (Form 990-T) for the calendar year 1975 with the District Director of Internal Revenue at Philadelphia, Pennsylvania. The amount of tax shown thereon was timely paid by Plaintiff.

6. The amount of income taxes erroneously and illegally collected from Plaintiff for the calendar year 1975 is $55,965. All of this amount, plus statutory interest thereon, is in controversy.

7. Plaintiff is and at all material times has been a tax-exempt organization described in Section 501(c)(3) of the Code. Plaintiff is and at all material times has been organized exclusively for charitable, educational and scientific purposes. Subject to the foregoing, the specific objects and purposes for which Plaintiff is and at all material times has been organized are to uphold and maintain high standards in medical education, medical practice and medical research; to encourage medical research especially in clinical medicine; to foster measures for the prevention of disease and for improving public health; to perpetuate the best traditions of medicine and to maintain high standards of medical ethics; and to maintain the dignity of the profession in its relationship with patients and the public.

8. During the year in issue, Plaintiff published two educational and scientific journals in furtherance of its exempt purposes: *Annals of Internal Medicine* and *The Bulletin*. Plaintiff carried advertisements in these journals almost exclusively for medical products and equipment of interest and assistance to plaintiff's members, all of whom are engaged in the practice of medicine or allied fields of education and research, and to others in the medical profession.

9. The collection of Federal income taxes at issue herein was based on the erroneous assumption that the net income from advertisements described in the preceding paragraph constituted unrelated business taxable income within the meaning of Section 512 of the Code as applicable to the year 1975. In fact, such receipts were from advertising which in and of itself was educational. The educational function of such advertising was not incidental; it was substantially related to the exercise or performance of Plaintiff's charitable, educational and scientific purposes. Accordingly, carrying

such advertising did not constitute an unrelated trade or business within the meaning of Section 513 of the Code, and the receipts from such advertising did not constitute unrelated business taxable income within the meaning of Section 512 of the Code. To the extent § 1.513-1(d)(4) of the Income Tax Regulations would require a different conclusion in this case, such regulations are invalid.

10. On or about June 12, 1979, Plaintiff filed with Defendant's representative a claim (Form 843) seeking refund on the grounds herein set forth of $55,965 of Federal income taxes assessed and collected with respect to the advertising income described in the preceding paragraphs. A true copy of said refund claim is attached hereto as Exhibit A.

11. Plaintiff's records contain no evidence of having received from Defendant a notice disallowing Plaintiff's claim for refund or of having signed a waiver of the requirement that such notice be sent (Form 2297). However, such notice would not have been sent, or such waiver would not have been signed, before August 19, 1980, the date on which Defendant secured Plaintiff's agreement to adjustments resulting from examination of Plaintiff's Form 990-T for 1975. Such adjustments in effect disallowed Plaintiff's claims for refund. (See the IRS examination report attached hereto as Exhibit B.)

12. By virtue of the facts set forth above, Defendant became legally indebted to Plaintiff in the amount of $55,965 for Federal income taxes erroneously, illegally and wrongfully assessed and collected for the year 1975, plus interest as provided by law from the date of payment thereof, and Plaintiff is justly entitled to such amount and interest from Defendant after allowing Defendant all just credits and setoffs.

WHEREFORE, Plaintiff prays for judgment against the United States of America, upon the facts and the law, in the amount of $55,965, or such other amount as may be legally payable in the premises, plus interest thereon as provided by law and for such other and futher relief to which Plaintiff may be entitled.

/s/ _____

JOHN B. HUFFAKER
2001 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109
(215) 893-3067
Counsel for Plaintiff

Of Counsel:
GORDON R. DOWNING
PEPPER, HAMILTON & SCHEETZ
2001 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109
(215) 893-3000

10a

Form **843**
(Rev. June 1972)
Department of the Treasury
Internal Revenue Service

Claim

If your claim is for an overpayment of income taxes, do NOT use this form (see Instructions)

Please print or type

Name of taxpayer or purchaser of stamps
THE AMERICAN COLLEGE OF PHYSICIANS

Number and street
4200 PINE STREET

City or town, State, and ZIP code
PHILADELPHIA, PA 19104

Fill in applicable items—Use attachments if necessary

1 Your social security number

2 Employer identification number
23-1520302

3 Internal Revenue Service office where return (if any) was filed
Philadelphia

4 Name and address shown on return, if different from above

5 Period—prepare separate form for each taxable period
From January 1, 19 75, to December 31, 1975.

6 Amount to be refunded or abated
$ 55,965

7 Dates of payment
June 14, 1976

8 Type of tax
☐ Employment ☐ Estate ☐ Excise ☐ Gift ☐ Stamp Income

9 Kind of return filed
☐ 706 ☐ 709 ☐ 720 ☐ 940 ☐ 941 ☐ 990-PF ☐ 4720 ☒ Other (specify) ▶ 990T

10 Explain why you believe this claim should be allowed and show computation of tax refund or abatement.

The advertising income received by this taxpayer does not constitute unrelated business income.

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Director's Stamp
(Date received)

Signed Fred C. Dierfeldt
Assistant Executive Vice Pres.

Dated 6/15/76, 19

For Internal Revenue Service Use Only

☐ Refund of taxes illegally, erroneously, or excessively collected.
☐ Refund of amount paid for stamps unused, or used in error or excess.
☐ Abatement of tax assessed (not applicable to estate or gift taxes).

See Instructions on back.

Form 843 (Rev. 6-72)

11A

EXHIBIT "A"

Internal Revenue Service
District Director

Department of the Treasury

Date:
SEP 1 0 1980

Kind of Tax: 990-T

Tax Year Ended: 12-31-75

51393_192_00094_6 23_1520302E 23438710
AMERICAN COLLEGE OF PHYSICIANS

8022
4200 PINE STREET
PHILADELPHIA, PA 19104 7512

Dear Taxpayer:

The enclosed report explains the adjustments agreed upon as a result of our examination of your tax return identified above. The paragraph checked below explains how settlement will be made.

☐ We will send you a bill for any additional tax plus interest if you have not already paid the full amount.
(If you send us a payment before you receive your bill, please write on it: "Audit Adjustment," your social security number, and the kind of tax and tax period for which it is intended. This will insure proper credit to your account.)

☐ We will send you a refund for the overpayment plus interest unless it is applied toward other taxes you owe.

☐ We will allow the overpayment as a credit against future liabilities.

☐ We will send you a notice of disallowance of your claim for credit or refund if you haven't signed a waiver of notification.

☐

Thank you for your cooperation.

RECEIVED
SEP 12 1980
J. H. CHAPPELLE
DIR., ADMIN, & FINANCE

Sincerely yours,

J. J. Ridenti

District Director

Enclosure:
Examination Report

600 Arch St., Philadelphia, PA 19106

Letter 891 (DO) (7-77)

EXHIBIT "B"

Report of Examination - Exempt Organizations

1. Form No.	2. Key District Office	3. Date of Report
990-T	PHILA, PA	

4. Name and Address of Taxpayer	5. Name and Address of Private Foundation (If different from Item 4)
AMERICAN COLLEGE OF PHYSICIANS 4200 PINE STREET PHILA, PENNA 19104	

6. Social Security or Employer Identification No.	7. Tax Period	8. Private Foundation's Employer Identification No. (If different from Item 6)	9. Tax Period
23-1520302	12-31-75		

10. Report Preparer's Name	11. Agreement Secured (Check one)
JAMES E. COLL	☒ Yes ☐ No ☐ Partial
12. Findings Discussed With (Name)	**13. Agreement Date**
MR JOSEPH CHIAPPELLE, CONTROLLER	8-14-80

14a. Summary of Proposed Adjustments

Internal Revenue Code Section (1)	Period Covered by Examination (2)	Amount of Tax (3)	Additional Tax (Private Foundations) (4)
511	12-31-75	55,965.-	
CLAIM	DISALLOWED	IN	FULL

14b. Penalty

Internal Revenue Code Section (1)	Amount (2)

Remarks: TAXPAYER FILED A CLAIM FOR REFUND IN THE ABOVE AMOUNT ON THE BASIS THAT ADVERTISING INCOME DOES NOT CONSTITUTE UNRELATED BUSINESS INCOME.

EXAMINATION CONFIRMS THAT ADVERTISING INCOME FROM THE "ANNALS OF MEDICINE" DOES CONSTITUTE UNRELATED BUSINESS INCOME UNDER SECTION 511 OF THE CODE. CLAIM DISALLOWED IN FULL

15. Schedules and Exhibits Attached

Form 4621 (Rev. 1-77) GPO 914-107 Department of the Treasury - Internal Revenue Service

EXHIBIT "B"

Page _____ of _____ page

Form 4549-A (Rev. September 1979) — Department of the Treasury – Internal Revenue

Income Tax Examination Changes

Return Form No. 990-T

Name and Address of Taxpayers	S.S. or E.I. Number	Filing Status
AMERICAN COLLEGE OF PHYSICIANS 4200 PINE ST. PHILA. PA. 19104	23-1526302	

Person With Whom Examination Changes Were Discussed — Name and Title: MR JOSEPH CHIARELLI, CONTROLLER

1. Adjustments to Income	Year: 1975	Year:	Year:
a.			
b.			
c.			
d.			
e.			
f.			
g.			
2. Total Adjustments	-0-		
3. Adjusted Gross, Taxable or Tax Table Income Shown on Return or as Previously Adjusted	94719.-		
4. Corrected Adjusted Gross, Taxable or Tax Table Income	94719 -		
5. Tax	55,965-		
6. Alternative Tax, If Applicable *(From Page _____)*	-		
7. Tax Surcharge	-		
8. Corrected Tax Liability *(Lesser of line 5 or 6, plus line 7)*	55,965-		
9. Less Credits *(specify)* a.			
b.			
c.	-		
10. Balance *(Line 8 less total of lines 9a through 9c)*	55,965-		
11. Plus: a. Tax from recomputing prior year investment credit	-		
b. Self-employment tax			
c.	-		
12. Total Corrected Income Tax Liability *(Line 10 plus total of lines 11a through 11c)*	55,965.-		
13. Total Tax Shown on Return or as Previously Adjusted	55,965.-		
14. Deficiency *(Increase in tax before credit adjustments, line 12 less line 13)*	-0-		
15. Overassessment *(Decrease in tax before credit adjustments, line 13 less line 12)*	-0-		
16. Adjustments to Prepayment Credits	-0-		
17. Balance Due *(Line 14 or 15 adjusted by line 16)*	-0-		
18. Overpayment *(Line 14 or 15 adjusted by line 16)*	-0-		
19. Penalties, if any *(See explanation)*	-0-		

Other Information

CLAIM DISALLOWED IN FULL

Examiner's Signature	District	Date
James E Cole	PHILA	8/ 1/80

Form 4549-A (Rev. 9-79)

EXHIBIT "B"

IN THE UNITED STATES CLAIMS COURT

No. 415-82 T

THE AMERICAN COLLEGE OF PHYSICIANS, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

ANSWER

[Filed Dec. 15, 1982]

Defendant, the United States, in answer to the petition in the above-captioned case, respectfully denies each and every allegation contained therein not admitted, qualified, or expressly referred to below.

Defendant further:

1. Admits the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2, except denies that any amount has been erroneously or illegally collected from plaintiff.

3. Admits the allegations contained in the first sentence of paragraph 3. Avers that its attorneys are presently without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the remainder of paragraph 3.

4-6. Avers that its attorneys are presently without knowlege or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4 through 6.

7. Admits the allegations contained in the first sentence of paragraph 7. Avers that its attorneys are presently without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the remainder of paragraph 7.

8. Avers that its attorneys are presently without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8.

9. Avers that paragraph 9 is a legal argument, to which no response is required.

10-11. Avers that its attorneys are presently without knowlege or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 10 and 11.

12. Denies the allegations contained in paragraph 12.

WHEREFORE, defendant prays that the petition be dismissed, with all allowable costs assessed against plaintiff.

Respectfully submitted,

/s/ _____

GLENN L. ARCHER, JR.
Assistant Attorney General

W. C. RAPP
Attorney

IN THE UNITED STATES CLAIMS COURT

No. 415-82 T

AMERICAN COLLEGE OF PHYSICIANS, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

STIPULATION OF FACTS[1]

[Filed May 26, 1983]

1. The College, founded in 1915, is exempt from federal income taxes under Section 501(a) and 501(c)(3) of the Internal Revenue Code.

2. For its taxable year 1975, the College timely paid federal income taxes in the amount of $55,965 with respect to income from advertising in its publications. On or about June 12, 1979, the College timely filed a claim for refund of these taxes. The College did not receive a notice of disallowance of this claim and did not waive receipt of such notice. The College timely filed a petition for a refund of these taxes on or about August 17, 1982.

3. The tax-exempt purposes of the College, as stated in the College's Articles of Incorporation, are, *inter alia*, (1) to uphold and to maintain high standards in medical education, medical practice [and medical research]; (2) to encourage research, especially in clinical medicine, and (3) to foster measures for the prevention of disease and for the improvement of public health.[2]

4. The College is a membership organization. Its members consist solely of members of the medical profession engaged in practice, teaching, research or other pursuits in the field of internal medicine or in allied or related specialities. In 1975, the College had approximately 32,000 members.

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[1] Unless otherwise indicated, the facts stipulated are applicable to 1975.

[2] The bracketed language was added after 1975.

5. In furtherance of its exempt purposes, the College publishes, *inter alia*, *Annals of Internal Medicine ("Annals")*. *Annals* contains scholarly articles relevant to the practice of internal medicine and is one of the most highly regarded medical journals in the field of internal medicine in the world.

6. *Annals* is provided to the College's members without additional charge as a benefit of membership. It is also available at a per issue price to, or may be subscribed for by, non-members. *Annals* also is circulated in medical schools and libraries (medical and non-medical) throughout the world. Its circulation in 1975 was roughly 73,000.

7. Each monthly issue of *Annals* contains advertisements relating only to medical products (primarily pharmaceuticals), supplies and equipment useful in the practice of internal medicine, and notices of positions available in connection with the practice of internal medicine. The advertisements for products, supplies, and equipment contain information about the use, indications and/or contraindications of and for such products, supplies, and equipment.

8. The College has a long-standing policy of accepting only those advertisements the content of which is restricted as described in the previous paragraph. To assure that the restrictions are met, every proffered advertisement is screened for accuracy and relevance to internal medicine. The College has rejected advertisements which have not conformed with its policy because of the type of products advertised or the inadequacy of information contained in the advertisements.

9. Advertisements in *Annals* are grouped or "stacked" in two sections, one in front of and one behind the editorial content of the publications.

10. In 1975, gross advertising income and direct advertising costs attributable to *Annals* were $1,376,322 and $833,050 respectively. Circulation income and readership costs attributable to Annals were $1,057,754 and $1,351,167 respectively. Another publication of the College produced an overall loss (excess of total periodical costs over total periodical income) of $96,471. The taxable income reported by the

College thus was $153,388 ($1,376,322 + $1,057,754 − $833,050 − $1,351,167 − $96,471).

11. No more than approximately 40 percent of the available page space in *Annals* is devoted to advertising on an average yearly basis.

12. Some medical journals are published by commercial organizations. Examples include American Journal of Cardiology (the official journal of the American College of Cardiology) and the American Journal of Medicine, which are (and were during 1975) published by a division of Dun and Bradstreet. Advertisements in the American Journal of Cardiology are grouped together in three "stacks," while those in the American Journal of Medicine are grouped together in a greater number of "stacks."

13. In some cases the advertisements appearing in plaintiff's publications are identical to advertisements appearing in medical journals published by non-exempt organizations, such as the two mentioned above.

14. In general, the College set advertising rates by reference to its costs and the need to be competitive with rates set by other similar medical journals.

15. The acceptance and publication of advertisements in the *Annals* during the year in suit constituted a trade or business, which was regularly carried on, within the meaning of Section 512 of the Internal Revenue Code of 1954, as in effect during the period in issue.

/s/ _____
JOHN B. HUFFAKER
Attorney for Plaintiff

/s/ _____
GLENN L. ARCHER, Jr.
Assistant Attorney General
Attorneys for Defendant

IN THE UNITED STATES CLAIMS COURT

No. 415-82T

THE AMERICAN COLLEGE OF PHYSICIANS, PLAINTIFF,

vs.

THE UNITED STATES, DEFENDANT.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS, SEPTEMBER 14, 1983

---

[29] * * *

MR. HUFFAKER: Thank you, Your Honor.

We would like to call Dr. Robert Moser, who is our first witness.

Whereupon,

ROBERT MOSER, M.D.

having been first duly sworn, was called as a witness, examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUFFAKER:

Q Would you state your full name and your present position, please?

A I'm Robert Harland Moser, and I'm the Executive Vice President of the American College of Physicians.

[30] Q Prior—when did you assume your present position?

A January 1st, 1977.

Q What was your medical experience prior to assuming that position?

A Well, I'm an internist-cardiologist. I received training in internal medicine, and had subsequent fellowships in pulmonary diseases, cardiovascular diseases and hematology. I spent 22 years in the Army as a medical officer; 15 of those years were as a teacher and as Chief of Medical Service at several Army hospitals.

I retired from the Army in 1969 as Chief of Medicine at Walter Reed.

I went into practice, private practice in a small town with a medical group. Did that, did internal medicine, general internal medicine, cardiology for about three years.

Then I went to the American Medical Association as the editor of the Journal of the American Medical Association and as the Director of the Division of Scientific Publications where I had responsibility for the 11 sub-specialty journals produced by the AMA.

I stayed there for about two and a half years. Returned to practice. And then was recruited for this present position in 1976, and have been there ever since.

Q The name of the Plaintiff is American College of Physicians.

[31] Would you tell us what you mean by a physician and what you distinguish that from internist? You refer to an internist.

A Well, at the time that the College was created in 1915, I assume that the distinction between a physician and an internist really had not been well defined.

We now realize and indicate that an internist is a physician who has had special training in the diagnosis and management of adult diseases exclusive of those related to surgery.

The original term "physician" was much more generic than that. But we are, if our proper name were given, we would be the American College of Internists. Although we do have some outstanding individuals from allied disciplines who are invited to become fellows of the College.

Does that answer your question?

Q Thank you.

Will you describe the program of the American College of Physicians as it was carried on in 1975 and as it's carried on today if it's any different?

A Well, the primary function of the College—I guess one of the primary functions of the College is medical education of internists and all others who wish to participate in our educational endeavors.

And through—by this—in this effort to [32] educate internists, the ultimate bottom-line hope is that this will provide better patient care throughout the efforts of these internists (sic).

We do this in a variety of ways. The College, in conjunction with the medical schools of the country, runs an average of 25 to 30 post-graduate courses a year that are dedicated to specific areas of internal medicine: cardiology, pharmacology, et cetera.

The College is divided into 72 regions. Each of these regions is obliged to have an annual meeting, and each of these annual meetings runs for one to two days, and scientific material is presented for the internists in that particular region. These are basically scientific programs.

We also put on a large annual session, once a year, runs for four days. It's an effort to expose our members to what is current in internal medicine. All of it is very intimately practice-related. It's a very large program, multiple simultaneous sessions.

We attract about 5,000 internists and others to this meeting. And it is our—the big show that we run annually. It's sort of the watershed of our year.

We also have a medical knowledge self-assessment program, which is now approaching its seventh edition. This is a program whereby all physicians, but most notably [33] internists, can take—study a syllabus that is related to the current information on the various sub-specialties of medicine that have been created in the preceding three years, it comes out every three years. Take questions, open-book type questions, send them in for computer scoring so they can compare their scores in the nine different areas of subspecialization to those of their peers who have also taken the examination.

And then they will receive critiques on the responses, the proper responses to the questions.

It's, in all candor, probably the best method that's been devised yet for physicians to assess their own current state of knowledge, and to take corrective action to shore up those areas where they seem to be somewhat deficient.

The success of the program is indicated by the fact that the College membership stands now at about 57,000, and we have—and the last two times we have sold well over 45,000 copies.

This is all voluntary. The internists, many of them, most of them are fellows and members of the College, but many come from outside.

And it's also extremely popular among medical students and house officers.

And then of course we have the Annals of Internal Medicine, which is sort of the flagship of our fleet. It is [34] the—again in all candor, I think the world's most prestigious publication in internal medicine.

It goes to some 87,000 members and subscribers. About, as I say, 57,000 members get it as a benefit of membership. And it goes to an additional 30,000 subscribers who have come from all disciplines, mostly internal medicine, and it's seen all over the world.

It is the most popular journal in internal medicine that is published in the world.

Aside from our educational endeavors, the College has always been involved in national standard setting. We work with other organizations through the Joint Commission on Accreditation of Hospitals to establish standards for hospital care, to insure that these standards are maintained in the hospitals.

We're also very much involved in standard setting for internal medicine training programs through participation in what's called the Resident's Review Committee where indeed we sit with the—two other organizations and evaluate the quality of training programs in internal medicine across the country.

So, in both of these areas, the College is also involved in a related educational endeavor but not quite the same as what I've described previously.

We are also very much involved in technology [35] assessment.

We are at the present time the only major national organization that is involved in the ongoing assessment of existing tests and procedures that are being used by practitioners in the field.

This program has been in existence for about seven years. It has matured significantly. And we are now about to launch a national network of internists who belong to the College who will provide input from the field about existing tests and procedures.

In addition, it is our intention that this network that is being utilized for the evaluation of tests and procedures, as soon as it is mature and functioning, will be used for post-

marketing drug surveillance. We hope to work with the FDA and with the PMA to do post-marketing drug surveillance in the field to—hopefully to expedite the knowledge gained about new drugs that are released for use by the profession.

The College is also involved in a major program of public education to advise the people, our patients and all other people about what they can do to help themselves to stay well and to keep themselves healthy.

This is done through a beginning, an embryo national network through our regions where physicians and internists who belong to the College will be called upon to [36] lecture community colleges, on local TV, et cetera. This is in its infancy, to be true; but it is a program that we hope will be national within about two years.

We also have a large health and public policy operation, which is very much involved in the issues of public welfare as they relate to our patients and to ourselves.

We are involved in addressing national issues, primarily as expert witnesses called upon by Congress and the regulatory agencies for expert testimony on areas related to cost containment, manpower, et cetera.

We're also involved in a program to try to assess some tech—to develop some technique to assess physician performance competence. By the survey of office and hospital records. This is a program of quality assurance that we're engaged in with two other national organizations.

We have two major councils of the college. One is called the Council of Sub-specialty Societies, wherein all of the major societies that are related to the subspecialties of internal medicine—meet in conjunction with the College twice a year. This includes the cardiologists, the gastroneurologists, all the other related sub-specialties. And we discuss issues of mutual concern to all organizations.

And our other council is called the Council of [37] Medical Specialties. And here we've embraced all of those that are allied to internal medicine, such as the geriatricians, the adolescentologists, and people who are in related disciplines but not necessarily those directly called sub-specialties of internal medicine.

This council addresses issues of how one can deal with the expanding problems in geriatric medicine, problems in ado-

lescent medicine, problems in environmental pollution, problems of adult immunization.

In other words, it has broadened the spectrum of College activity into areas that previously we had great difficulty addressing.

So, in summary, we have a broad range of interests, but the cardinal interest of the College remains the education of internists.

MR. HUFFAKER:—these are—this is the 1975 issues of the Annals. The witness has testified that this is a publication of the College.

I would like to have them marked and admitted in evidence.

Because of the broad stipulations in this case, Your Honor, I don't think we will be submitting any other exhibits for admission.

THE COURT: Response?

Have they been marked?

[38] MR. HUFFAKER: How would you—how would the Court like them marked?

THE COURT:—stamp.

MR. HUFFAKER: Stamp.

MR. RAPP: If I might inquire, Your Honor, are these going to be Exhibits 1 through 12, or—

MR. HUFFAKER: This will be—on the list of exhibits—

MR. RAPP: 27.

MR. HUFFAKER:—that was Exhibit 27. But this is because of the—the list of exhibits was arrived at before we entered into the very broad stipulations.

And so we really do not see that the other exhibits will be necessary.

So, would the Court—would it be a convenience to the Court to number these 1 through 12; or would you rather we retain the number in the submission and use A's, A, B, C's?

THE COURT: Probably be less confusing, since there are so few exhibits, to just number them 1 through 12—

You have one copy, I take it?

MR. HUFFAKER: Yes, Your Honor.

I believe we have previously submitted a copy to the Defendant.

MR. RAPP: We have possibly the only other complete [39] set from 1975, yes.

THE COURT: A collector's item.

MR. HUFFAKER: And we will ask permission to withdraw the exhibit at the conclusion of the case.

THE COURT: Oh, so, you're really not—oh, at the conclusion of the case.

Well, you may not want it stamped then. Perhaps what you ought to do then is affix a piece of paper with a staple or paper clip to each front cover, and put the exhibit stamp on that. That way you will have an unblemished set when—

Why don't you do this—why can't we do this at—

MR. HUFFAKER: We'll do that—

THE COURT:—over lunchtime. If you'd like me to look at those at this point, just hand them up and I'll look at them if the witness is going to testify about them. If not, just hold onto them until—we'll take them up when you have them marked.

MR. HUFFAKER: Thank you, Your Honor.

THE COURT: I have a stapler up here and I have paper clips up here as well.

And I think I have pieces of paper somewhere.

These yellow pads.

MR. HUFFAKER: We'll take care of the housekeeping at lunch, Your Honor.

[40] THE COURT: Very well.

BY MR. HUFFAKER:

Q Referring to the issues of the Annals, how would you describe the contents as to the subjects covered in it?

A You mean the scientific content?

Q Yes.

A Articles are selected on the basis of their pertinence to practicing internists.

They may be very clinical, that is related to direct bedside application, or they may be—represent new advances in the pathophysiology of disease, our knowledge of how disease occurs.

They may be related to new drugs that have been—have come on the scene and the early preliminary studies related to these drugs that may emerge as areas of interest to practicing internists.

There are—the Journal carries, I would say 95 percent of its material is directly related to the practice of internal medicine. There is a small section usually devoted to problems related to sociology, psychology, other aspects; but that represents a very small fraction of the material, the editorial material in the Journal.

Q The—how—does the Journal contain—does—advertising?

A Of course.

[41] Q How would you characterize the advertising?

A The advertising is basically from pharmaceutical companies that are—have usually recently had a new drug released by FDA and want to let the profession know very quickly that the drug is now available.

Sometimes a drug is released by FDA, an old drug with a new indication.

Also the pharmaceutical companies want this information to be made available to the physicians and they utilize the pages of the medical journals for this purpose.

We also run classified advertising for the benefit of our members, relating new positions that are available across the country, both in academia and also in private practice.

Q Have you had reason to evaluate the role of the advertisements in the Annals?

A Yes. If I may, I think I've summarized this in an editorial I was asked to write by the editor when I first came to the College back in '77.

And if it's okay, I think I can save a lot of time by just quoting from that particular editorial.

It's—I haven't changed my mind, and it's essentially what I still feel about the issue.

Q Well, I will submit the copy in evidence; but would you care to—

[42] A Just two sections that I'd like to read that I think are pertinent to what you just asked me.

This is, quote, "Drug advertisements in peer review journals are a vital part of continuing pharmacologic education. Since the Food and Drug Administration has imposed guidelines that limit advertising copy to content that does

not extend beyond package insert information, truth in advertising is not an issue.

"The eye-catching quality of the advertisement may determine whether the reader pauses at the page or passes it. Individual judgments will differ on an advertisement's format and taste, but the written content is guaranteed to be factual.

"The considerable literary and promotional talents of advertisements writers are brought to bear so that a busy clinician can catch the gist of the message in a flash.

"No one, including the advertisers, expects that any good clinician will leap up and dash off reams of prescriptions on the basis of an appealing advertisement. But it does serve an alerting function. To provoke the physician's interest to the extent that he will look further into the drug's use by reading a contemporary pharmacologic text, or ask his librarian to reproduce a few references from current journals, or look it up in the Medical Letter or the AMA drug evaluations.

[43] "This catching of the reader's attention is a short but important step on the trail of education on drug use to more enlightened prescribing habits."

And subsequently, "Most of us scan advertisements to see if some new product has surfaced that somehow has managed to escape our ritualistic perusal of favorite journals.

"Often we are surprised to find that a new product has come on the American scene. Perhaps it is one that has already thrived in Britain for a few years and has just recently emerged from the fine grinding mills of the FDA. Or it may be an entirely new drug that has been receiving rave notices in journals we do not read."

End of quote.

I still feel essentially the same, that the primary function that these advertisements serve to our members is to alert them, and to let them know about a new drug that has recently been released or an old drug that has been released for a new indication.

I don't think anyone has any pretense, as I indicated in the editorial, that this is the ultimate pharmacologic information that will make a determination as to whether a physician

prescribes that drug. But certainly it does serve a most valuable alerting function.

MR. HUFFAKER: May it please the Court, since [44] the doctor has read a portion of the editorial, I think it would be appropriate to admit the full into evidence. It was on the list of exhibits as P6. We would have it marked as Exhibit 13.

MR. RAPP: No objection, Your Honor.

THE COURT: Very well. You want to—do you have a copy for me and one for the Reporter, that will be even better.

Thank you.

And that's two sheets. And it's admitted—(The document referred to was marked for identification as Plaintiff's Exhibit No. 13 and admitted into evidence.)

BY MR. HUFFAKER:

Q Do all issues—all copies of the Annals contain advertising?

A No, they do not.

We have eliminated advertisements from all of the overseas issues that we produce.

This was done for two principal reasons. One is because in most foreign countries the drugs that are available in the United States may not be available, or they may be available and under different names and in different dosage, in different forms.

[45] Consequently, we thought it would not be very valuable to physicians abroad to have this information.

And second, a very practical matter, by reduction of the weight of the Journal by removing the advertisements, it made it a little cheaper for us to mail them overseas.

Q What has been the reaction of the foreign doctors to receiving this smaller edition?

A Well, it was curious that Dr. Huth, the editor, has received some informal—and some letters from foreign physicians in South America and Japan, to my knowledge, wondering why the drug advertisements had been removed from their copies of the Journal, expressing some interest in what is available in the United States, and not—and we were somewhat interested in that reaction.

We have no intention of putting them in, but there was considerable expression of their desire to have these advertisements so they could see what was being used in the United States.

MR. HUFFAKER: No further questions, Your Honor.

MR. RAPP: Good morning, Doctor.

THE WITNESS: Good morning.

MR. RAPP: I'm not going to keep you much longer.

CROSS-EXAMINATION

BY MR. RAPP:

Q In 1975, was insulin a new drug on the market in [46] the United States?

A No.

Q Darvon compound? Which I under—which is a brand name, I guess, but certainly you know what I'm talking about.

A Prepoxyphine (phonetic) was not a new drug. We—it had not—I don't recall actually when it hit the market, but it was—I think it had probably been out for four or five years.

Q Certainly niacine preparations were not newly being offered in 1975, were they?

A I don't know if they were being offered for any new indication. The use of vitamins does change now and then.

But I—it was certainly a well-known drug—vitamin.

Q Does the management of Annals make any attempt to make certain that the subjects, that is the drugs primarily, that are covered in each issue represent a comprehensive spectrum of the drugs that are available in the United States?

A I'm not sure I understand what you mean.

Q For instance, we pointed out before that Darvon is a brand-name drug. Other manufacturers then, whoever it is who owns the name "Darvon," manufacture the same [47] substance, don't they?

A I think at that time Darvon probably was still under its patent.

Q Well, certainly there are drugs that are pharmacologically identical but nevertheless are marketed by a number of drug manufacturers under different names.

A If a patent has expired, that is the case.

Q If an advertisement—if an advertiser seeks to advertise one of these competing drugs in Annals, Annals doesn't insist that all of its competitors advertise in the same issue, do they?

A Be a little difficult to do that.

Q I would certainly think so.

And certainly the Annals doesn't go out and seek advertising of certain classes of drugs because they think those will be of particular interest to the readers?

A No. I think that the—when a new drug that—is released that the industry certainly wants to get it propagandized to the profession, yes.

So, there's really very little need to go out and seek that.

Q And the Annals also publishes, in addition to advertisements for prescription drugs, there's advertisements for nonprescription drugs also.

A I think it does carry aspirin advertisements and [48] probably the acetaminophen, Tylenol.

Q Advertisements also for Maalox?

A Yes. I haven't checked the whole roster of drugs that are advertised—

Q Certainly.

A —most recently, but—

Q But you wouldn't be surprised to discover—

A No.

Q —a Maalox ad.

Support socks ads?

A No, I would not be surprised if some devices were advertised, yes.

Q Certainly. I wasn't surprised myself.

MR. RAPP: I have no further questions of this witness, Your Honor.

MR. HUFFAKER: No questions. Thank you, Doctor.

THE COURT: Thank you, Dr. Moser. You are excused.

(Witness excused.)

THE COURT: Mr. Huffaker?

MR. HUFFAKER: I'd like to call Dr. Edward Rosenow.

Whereupon,

EDWARD ROSENOW having been first duly sworn, was called as a witness, [49] examined and testified as follows:

MR. HUFFAKER: May I point out to the Court that the doctor is wearing a hearing aid, and we may have an occasional difficulty with a question, Your Honor.

THE COURT: I will certainly shout if necessary.

THE WITNESS: I can turn it down if you want.

DIRECT EXAMINATION

BY MR. HUFFAKER:

Q Your full name, please?

A Edward C. Rosenow, R-o-s-e-n-o-w, Junior.

Q Were you formally Executive Director of the College?

A I was the Executive Director from 1960 until I retired in 1977, with one change of title; I was made an Executive Vice President somehwere along the way.

Q Prior to becoming Director, Executive Director or Vice President of the College, what was your medical experience?

A Well, I grew up in Rochester, Minnesota. My father was a research bacteriologist at the Mayo Clinic. I went to Harvard Medical School and back to the Mayo Clinic for my training.

I've practiced internal medicine at Pasadena, California from 1940 until 1957. During that time I was also a Clinical Professor of Medicine at the University of [50] Southern California, a position in teaching that I continued when I came to Philadelphia at the University of Pennsylvania.

I edited a tape journal in California. And I was always interested in continuing medical education, and was for two and half years the Executive Director of the Los Angeles County Medical Association.

And I made the decision that I could probably effect better health care for more people if I gave up a one-to-one practice of medicine and became a medical society executive.

And that's why I moved to Philadelphia and became the Chief Administrative Officer of the American College of Physicians.

Q Could you describe the advertising policy, or the policy toward selection of advertisements in the Annals?

A At that time?

Q No sir. Start with when you came in, and—

A Well, this was an ongoing thing. I didn't start putting advertising in the Journal.

But this was in the years before—in the early 60's. It was before the FDA had made their rules about full disclosure and giving all the information in advertising.

So, we had to do that. We had a very active [51] committee of physicians in the Philadelphia area who would meet approximately once a month. And they would screen the advertising copy that would come to them. And make a decision about, number one, was it appropriate to the specialty of internal medicine and the allied health fields; and number two, was the content of the ad factual and accurate information.

And the third thing we did, which sometimes bothered the advertisers, we also took an opinion occasionally about what was an appropriate way of putting the information together. In other words, what was the makeup of the ad: was it attractive or was it revolting or—I found out a lot about advertising then, that apparently the more attractive it is apparently the less it sells anything. And so, we had some arguments about that.

But then we would—we'd pass this around to the doctors, and they would give other opinions, and they'd come to a decision. And then it was approved.

This took a lot of our time and effort.

And we also—part of the staff function, really, was to—we were authorized to turn down ads that had nothing whatever to do with internal medicine. Somebody might want to advertise a real estate development, or maybe might want to sell us some Crisscraft cars. We never put any of those kind of ads in.

[52] And occasionally we would—I remember when I appeared before the Ways and Means Committee, they asked me if we ever turned down an ad. And we did. Several times. And several times it resulted in a pharmaceutical company cancelling a two-year contract for monthly ads in the magazine.

The reason that we turned them down was that a statement would be made with which our committee could not agree.

One example: one company one time said, "Until you get the results of the test back, give penicillin." And our doctors didn't like that very well.

And we stuck by it, and it worked pretty well.

Q What—the screening of the ads must have used a great deal of time. Was this not only the paid staff of the College but also the membership, volunteer—

A That's right. Up once a month meetings.

Then we had a fairly small staff, but we had an advertising manager and a few people. And I spent a fair amount of my time looking over ads, talking on the telephone to people that felt that I needed to be put in the proper frame of mind about their ads.

I did my best to do this. But it was a much busier thing until after the FDA put in their requirements of full information.

[53] That kind of function pretty well dropped out, except that we still had a system worked out where one or the other of us—Dr. Kay was my assistant at that time, or I—would get guidance to the advertising manager whether a certain ad should be put in.

And occasionally we would get in touch with one of the experts at the university and check it down.

Q Have you had occasion to evaluate the importance of advertising to the readers of the Annals?

A Would you repeat that again?

Q Have you had occasion to evaluate the importance—

A Oh, yes.

Q —of advertising to the readers of the Annals?

A Yes. Before I made that trip to the Ways and Means Committee in '69, I did write around to a number of physicians known to me who were in the private practice for general internal medicine and I asked them what they felt the advantages and any possible disadvantages to putting advertising in the Journal.

And I got—from that group, I didn't survey all 30,000 of the members, but I got a very strong and positive reaction

that they found it a convenient way to be reminded of ads and to look at them. They found them very informational and educational.

I didn't have anybody say we shouldn't have them.

[54] Once in a while you'll get a professor in a medical school that thinks you shouldn't put anything in there except an article which one of his people has written.

But other than that, most doctors, I think, are favorable toward advertising.

They find it convenient to—I might say one thing to Your Honor. You may have heard the expression that the half-life of medical knowledge is about five or six years.

A good deal of the things that change very rapidly and all are the therapeutic modalities, the drugs and the various kinds of—and they change all the time.

And that's the part that goes away within five years. You have to learn something new.

So that anything—we always felt that anything we did to give the doctor reminders and things about therapeutic things was a very educational function we had to perform.

Q Did you have occasion to testify before the Ways and Means Committee in 1969?

A Yes, I did.

Q Could you relate to the Court the—what transpired at the hearing?

A Well, I was sort of a neophyte before the Ways and Means Committee. And so I found that after I'd read about [55] two paragraphs of my prepared statement, they weren't paying much attention to me.

In fact, they were busy doing some other things. And that bothered me a little bit. So, I shifted gears along in the middle of the thing and gave them a very extemporaneous bit of information about how I as a practicing physician would read Journal advertising.

And that—well, it's even in pretty poor English because when you talk it's not quite the same as when you write.

But in this I had—I wanted to get across to them that—and what I did, I had magazines like that. And at each place—and then I turned and went through the thing. In a fair number of ads and showed them what was being done

for high blood pressure. And everybody on the panel up there knows what high blood pressure is.

And that had a very good reception. And after I finished, one of the congressmen motioned for me to come up and talk to him.

And this was the end of a long day. You start about 10:00 in the morning and this was about 5:30 in the afternoon. I was the last witness. And we'd heard from all sorts of trade associations and some of these privately-held foundations where the father's the president, the mother's the vice president, the lawyer's the treasurer, [56] all these sort of things.

And he said, I've had no difficulty writing some kind of law that would exempt an organization like yours from taxation, but you can see it'd be a pretty hard job to write a bill that would fit you and all these other people.

Well, I said, that's your problem, it's not mine.

But, you know, it was an enjoyable experience. I didn't really feel that I'd convinced them too strongly. But I did urge them to not change the law to fit the regulations. I think that was the sort of sense of what I said at the time.

Q Did you testify concerning the relationship of the advertising to the exempt function?

A Yes, I did. I said that it was related.

Q Did you view your—the committee's action as consistent with your position, or—

MR. RAPP: Objection, Your Honor. This calls for a conclusion of the witness apparently about legal matters, what the actions of the Congressional committee were in response to his testimony.

I mean, I also don't see as a factual matter he can possibly know that.

MR. HUFFAKER: The wit—

THE COURT: I understand—a doctor and not an [57] attorney. Nevertheless, I would like to hear what he has to say on the subject.

So, permit him to testify.

Do you remember the question?

Would you like to repeat the question, Mr. Huffaker?

BY MR. HUFFAKER:

Q The—

A Well, I think I can simplify your question a little bit, because when I appeared before the Committee, they didn't have any action.

They were going to take some action. But at the time I have no knowledge of what action they might have taken or—so, I don't think that—the question I don't think I can quite answer either yes or no. Because I knew nothing about what their action was.

I knew what they were thinking of doing. And I knew what the Internal Revenue Service change in regulations on the old law from 1950 was. But I didn't know what they were going to do at that time.

Q All right.

MR. HUFFAKER: Thank you. No further questions.

MR. RAPP: The United States has no questions for this witness, Your Honor.

THE COURT:—

[58] THE WITNESS: Thank you very much

THE COURT: Thank you very much for your testimony. You are excused.

(Witness excused.)

MR. HUFFAKER: Dr. Lasagna, Louis Lasagna. Whereupon,

LOUIS LASAGNA, M.D. having been first duly sworn, was called as a witness, examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUFFAKER:

Q Your full name and position, please.

A My name is Louis Lasagna. I'm Professor of Pharmacology and Medicine at the University of Rochester School of Medicine. Rochester, New York.

Q Could you relate your background as an academic and medical educator?

A Well, after house staff training in internal medicine, I spent two years at Johns Hopkins University School of Medicine in the Department of Pharmacology and Experimental Therapeutics. From there went to the Massachusetts General Hospital where I was a research associate in anaesthesia for two years.

Then I came back to Hopkins, and for 16 years organized and ran the Division of Clinical Pharmacology [59] in the medical school there.

In 1970, I went to the University of Rochester to become Chairman of the Department of Pharmacology and Toxicology as it was then called.

I stepped down from the chairmanship about three years ago.

Q As a specialist in drugs, do you have any responsibilities for finding out how the physicians keep up with the developments in the field?

A A part of our research over the years has been not only to study what drugs do but how they are used and what perceptions doctors have of them and what perceptions patients have of them and the problems that are involved in optimizing the use of medicinals in medicine.

Q How valuable or how lasting is the knowledge that the physician gets during his formal period of training?

A Well, if a physician were to retain only what he learned during his formal years of training, he'd be somewhat out of date on day one after that.

It would become increasingly out of date as the years went by. This is true not only of laboratory diagnostic tests and devices and what-have-you, but is very true about drugs, because the rate of new drug development is substantial, both new chemical entities that are marketed every year—there may be ten to thirty of those in the United States.

[60] But then there are also many more changes in old drugs, in dosage forms and strengths, what-have-you; new delivery systems.

And then there are changes that have already been alluded to, that is new information about old drugs that are already on the market, either new good things that those drugs do or new bad things that we've become aware of that those older drugs do.

Q You're familiar with the Annals of Internal Medicine?

A I am.

Q Have you formed an opinion concerning the relationship of the advertising in the Annals to the internist who would be the typical reader?

A Yes, I have.

Q Could you express that?

A I've been a subscriber to the Annals I suspect since about 1947, and I've had occasion not only to read it but to recommend it to medical students and young physicians and old physicians over a good period of years.

I consider it the premier journal for general internists.

And I think it's especially important that the scientific content, or the editorial content be looked at in a sort of point-counterpoint relationship with the [61] advertising in the Journal, because neither one alone would give a practicing physician a full basis of knowledge about using the drug.

For example, in the scientific pages of the Annals one may find a description of a new use of a drug, or a new adverse effect. That is not present in the official labeling of a drug. it is not present in the advertising.

So that the physician has to take that new piece of information—or it may be an opinion by an expert about a drug—and contrast it with what is the officially approved labeling. Because, while that labeling may be incomplete or out of date, it is nevertheless the official basis for promotion, and may have some implications if the physician strays beyond the labeling and gets into trouble.

So, I look on the various sections of the periodical as interacting in an important way in trying to keep doctors up to date.

Q Do you view the Annals as contributing importantly to keeping the doctors up to date?

A Oh, no doubt about it.

Q Those are high opinions of the Annals? Are you a member of the College?

A I'm not a member of the College.

Q Are you active in connection with other medical journals?

[62] A Yes, I am.

Q Are you familiar with the different methods by which journals are published?

Now, we would say this one is published by the College. Could you describe the way other journals are published?

A Well, there are some journals that are published by a private publishing house, where the motive, at least it's in part profit. Certainly education occurs through those journals as well.

Then there are also relationships between professional societies and private publishers wherein the society gets a return from the profits of that journal without taking any risk, and perhaps having less control over who edits it and how it's printed and where the ads are placed, et cetera.

So, you have the—a spectrum from a journal that is published really independently of any professional organization to one where the professional organization calls all the shots.

MR. HUFFAKER: No further questions, Your Honor.

MR. RAPP: Just one quick series, Doctor.

CROSS-EXAMINATION

BY MR. RAPP:

Q The American Journal of Medicine—I'm holding up [63] what's been marked for identification as Defendant's Exhibit 1—are you familiar with this?

A Yes sir.

Q Would this fall into the category that you've described as independent of the medical—the organized medical society or organization?

A Yes, it would.

Q And marked here for identification as Defendant's Exhibit 2, the American Journal of Cardiology. I would assume that this falls into the middle. This has—this is published as the official journal of the American College of Cardiology but is nevertheless not published by them.

That's one of the ones in the middle that you described?

A Yeah. I think that's correct, but I'm not—I'm not one hundred percent sure about that particular journal.

Q Are you familiar with the various ways that drug companies bring new drugs and new uses for old drugs to the attention of doctors?

A Yes, I am.

Q Could you describe for us all of the different ways that you're aware of that that's done?

A Well, there will be in addition to advertising in medical journals—there will be mail pieces—not all drug companies use that route, but some certainly do. [64] There will be visits to physicians by professional representatives of the company.

There will be meetings sponsored by pharmaceutical firms where physicians can attend.

I think those are the major ways.

MR. RAPP: Thank you very much, Doctor. I have no further questions of this witness.

MR. HUFFAKER: One question, Your Honor.

REDIRECT EXAMINATION

BY MR. HUFFAKER:

Q What is the function of the advertisement of a drug that has been on the market for some time?

MR. RAPP: Objection, Your Honor. He's asking a question that would require the doctor to form a conclusion as to the motive by whoever places the advertisement.

THE COURT: Perhaps we can inquire into Dr. Lasagna's basis, if any, for such knowledge.

BY MR. HUFFAKER:

Q Doctor, you are aware that some of the advertisements relate to drugs that have been on the market for some time?

A Yes, I am.

Q In your opinion, what service do these advertisements serve?

A As I've talked with people in the pharmaceutical [65] industry, I think they call those ads "reminder ads."

They keep the physician aware of the existence of the medication, which he has been aware of before, has used before. But the idea is to keep it still fresh in his mind.

Now, when an older drug is promoted because of new information, that is a new indication or a new adverse effect, the purpose is quite different. Then it's a matter of communicating brand new information about a drug that the physician has already perhaps used on many, many occasions.

MR. HUFFAKER: No further questions.

MR. RAPP: Nothing further, Your Honor.

THE COURT: That's all. Thank you.

(Witness excused.)

MR. HUFFAKER: Dr. Stewart Bondurant, please.

Whereupon,

STEWART BONDURANT, M.D. having been first duly sworn was called as a witness, examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUFFAKER:

Q Will you state your full name and your present position?

A My name is Stewart Bondurant and I'm Dean of the [66] School of Medicine of the University of North Carolina at Chapel Hill.

Q Prior to assuming this position, could you give us your medical background?

A Well, I'm a graduate of Duke University School of Medicine, and the internship, residency and research fellowship at Duke University, and also was a resident at the Peter Brent Brigham Hospital of the Harvard medical complex.

I have been a full-time academician throughout my career, first on the faculty of the University of Indiana School of Medicine for ten years, and thereafter on the faculty of the Albany Medical College for 13 years, the first of that I was Chairman of the Department of Medicine with two responsibilities there that I think are relevant. One, is as director of the residency training program for internists. And the other is—was as physician-in-chief in the 800-bed Albany Medical Center Hospital.

I then became president and dean of the Albany Medical Center, in which position I served until 1979 when I assumed my present position.

Q Have you held offices in the American College of Physicians?

A I've held a number of offices in the American College of Physicians.

I served as Governor of the College for New York [67] during the late 1960's. And beginning in about 1970 I served on the Board of Regents of the College for five years. I was a member and Chairman of the Publications Committee, which is responsible for setting publications policies for the Annals.

I also served as Vice President and President of the College.

Q In the education of physicians, what is the focus of training with respect to responsibilities or future developments or sensitivity to future developments in the medical field?

A Well, as you've heard other speakers, other witnesses this morning describe, medicine like I guess many oth parts of society is much taken by this rapidity of change and the rapidity with which things become obsolete.

So that most medical schools—indeed, as far as I know, all medical schools in the country—have adopted the educational philosophy that their prime responsibility is to equip the student for a lifetime of learning.

So as to remain competent throughout life. Rather than the old-fashioned notion of imparting a fixed body of knowledge which can be the basis for professional practice.

In order to do that, most schools attempt with [68] varying success to communicate broad principles which are likely to be stable over time, and to create a framework for specific kinds of learning to the students, and also to teach the students how to continuously acquire new information and to acquire it critically, to judge critically as new treatments or diagnostic techniques or approaches are put forth so that they will exercise—be able to exercise a professional judgment as to what they retained.

There are many other themes in medical education. And I—but I think [that] is the key theme that's relevant this morning.

Q You're familiar with the Annals of Internal Medicine?

A Yes.

Q Can you—have you formed an opinion concerning the relationship of the advertising content of the Annals and the ongoing training of the physicians?

A Well, my opinion is very much the same as that summarized so well by Dr. Moser in his editorial that he wrote, and also by Dr. Lasagna immediately previously.

The material in the advertisements serves in a very effective way, in my judgment, as an alerting function. Students are—as Dr. Lasagna pointed out, students are encouraged to read the Annals. They do read it regularly. They are thereby exposed to this alerting function and learn [69] to incorporate it into their—as part of their learning—as part of their learning process.

Complementary, in a sense, to the scientific portion of the journal. Complementary in the sense of being not redundant.

Q I would assume that many of the ads that appear in the Annals would also appear in other medical journals.

A I believe—I'm sure—I know that to be the case.

Q Is there anything that is different—or, let's put it this way: Is it more important that an internist read the Annals than it is to read other medical publications?

A Well, there is a point which seems to me to be an important one, having been responsible for the education of internists, and that is that the internist, by virtue of being responsible for the care and treatment of diseases of the so-called internal organs or the organ systems of the—of man, not using surgical interventions of any kind, is, if not unique, very, very unusual among all specialities of physicians in the dependence on drugs.

The hall—to me it would be unthinkable that there could be a competent internist who is not a master clinical pharmacologist.

It is—at the very heart of internal medicine [70] is the sophisticated use and decision not to use drugs. The sophisticated decision of when to use and not to use drugs.

So that clinical pharmacology gets great emphasis in the residency programs by which we train internists, and pharmacologic—the mastery of drugs is really the hallmark in many—in a sense, the hallmark of the internist.

Q I would imagine that the practitioner has to budget his time, like all the rest of us. There are more things to do than he has time to do them.

Would you have views on a—whether the internist should have a regular program of reading?

A One of the things that we try to help our students to do is to develop patterns of learning which they can follow throughout their lives.

Different students develop different patterns. And we encourage each one to do his own.

But one of the patterns that is encouraged in many formal and informal ways is the use of journals as a—one of the keystones of a personal program of continuing education.

So that our students and our residents are encouraged in many ways to use the journals as an integral part of their professional continuing education.

[71] Q Would you view using the journals as including reviewing the advertisements?

A Yes.

MR. HUFFAKER: No further questions, Your Honor.

MR. RAPP: No questions for this witness, Your Honor.

THE COURT: Dr. Bondurant, thank you for your testimony. You're excused.

(Witness excused.)

MR. HUFFAKER: That concludes our case, Your Honor.

THE COURT: Maybe we could break for lunch at this point, and that will give you, Mr. Huffaker, opportunity to mark those exhibits, and also give you an opportunity to review Mr. Rapp's proposed exhibits to see whether you would have any objection or not.

After lunch we can take up defendant's exhibits.

MR. HUFFAKER: We'll have no objection to his exhibits.

THE COURT: Do you want to do it now, Mr. Rapp, then?

MR. RAPP: I would offer them again, Your Honor. I—they've already been marked and the reporter has a list describing them all.

THE COURT: Okay. This is what, Defendant's 101?

[72] MR. RAPP: Defendant's Exhibits 1 through 12.

THE COURT: You probably want—101 through 112.

MR. RAPP: We can certainly do that.

THE COURT: Why don't you do that?

I don't like to have duplication of numbers—

Very well, if there's no objection, why don't you introduce them?

Are these the same type of exhibits which—

MR. RAPP: Yes, Your Honor—

THE COURT: You only have one copy and you would like to have them—

MR. RAPP: Well, at the conclusion of the case, I had anticipated withdrawing them, yes.

THE COURT: Well, perhaps somebody—since I'm going to be going off to lunch anyway, maybe somebody can give me a copy of Annals to just look at.

MR. RAPP: Yes, might I encourage the Court to examine a copy of the Annals and copies of the Defendant's exhibits also?

THE COURT: Very well. Give me one of—whatever you want me to look at at lunch.

This will be, that what you just handed me is January 1975. Mr. Huffaker, you will reserve what, Exhibit 1 for that.

MR. HUFFAKER: That will be Exhibit 1, yes, Your [73] Honor.

THE COURT: Very well. And then I—

MR. RAPP: And these would be Exhibits—Defendant's Exhibits 101 and 102.

THE COURT: Very well. I'll—this will make interesting reading at lunch, although I will not rely on information in the advertisements because it's now been eight years and I'm sure they're all out of date.

Shall we meet at—what—what's a convenient time for all of you to come back from lunch?

MR. HUFFAKER: Just the convenience of the Court.

THE COURT: Would you prefer a shorter recess, a long recess?

You have clients here, Mr. Huffaker, or—what is—

MR. HUFFAKER: I have—

THE COURT: Are they going to be staying for argument—I don't really care. I'm just saying if they have to go out of town, they may prefer to be back—perhaps you can check with—

MR. HUFFAKER: Let me—may I conduct a—

THE COURT: Very well.

MR. HUFFAKER: —when we should come back?

I think 1:30 would be convenient from my point of view, Your Honor.

[74] THE COURT: That convenient for you?

MR. RAPP: 1:30, fine, yes.

THE COURT: 1:30 it is. See you—

THE CLERK: The Court is in recess.

(Whereupon, at 11:45 a.m., the hearing was recessed, to reconvene at 1:30 p.m., this same day, Wednesday, September 14, 1983.)

IN THE UNITED STATES CLAIMS COURT

No. 415-82T

THE AMERICAN COLLEGE OF PHYSICIANS, PLAINTIFF,

v.

THE UNITED STATES, DEFENDANT

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS, SEPTEMBER 14, 1983, SETTING FORTH ORAL FINDINGS OF THE CLAIMS COURT

[144] * * *

THE COURT: Please be seated.

* * *

I take it both cases now stand submitted, and there's nothing further anybody has thought of?

(No response.)

Very well.

Okay. Let's see what you got.

Now, first of all, to define the issues. And I think we understand what they are, but let's be sure that [145] we understand what the case is not about.

There is no question that has been raised about the purpose or the quality of the Annals journal.

There's no doubt from the testimony, and I think it's undisputed, that it is probably the world's foremost journal in the area of internal medicine.

There is also no question raised as to whether the activity that's carried on, the advertising activity, is consistent with the educational purposes of the journal. I think the Government has conceded and there is no disagreement that in fact putting in advertising is consistent, and the fact that monies being made on the advertising does not in any way detract or endanger the status of the organization as an exempt organization, at least certainly not in this litigation.

The question, and it's really rather a narrow question, is whether the income that is made by the College in selling advertising from—to be published in the journal is to be taxed.

And that turns on two issues: whether that activity is related or unrelated to the purposes of the organization, and if—and also whether it is being run by the conven—for the convenience of the members, whether the advertising is being run for the convenience of the members.

And as I think everybody agrees, the Government has [146] to prevail on both of those issues in order to prevail. Plaintiff can lose on one issue and succeed on the other and still—and still prevail.

Now, for me to pass—to divide—first of all, for the purposes of discussing the question of relatedness, it is convenient to divide the advertising of the two kinds, the kind that is called classified advertising and the kind is called unclassified advertising, or the nonclassified, or the drugs and drug manufacturers and so on.

Now, Plaintiff made an argument that the classified advertising does relate to the business of the organization. And I think the argument was made as well could be made, but I simply cannot accept that argument.

As far as the classified advertising is concerned, it deals with the individual concerns of members as professionals and not—is not nearly in an important way or a direct way related to the objectives of the College, which are to uphold and maintain high standards of medical educational practice, encouraging research, and fostering the prevention of disease.

Naturally, anything that helps physicians do their job more effectively, more efficiently, that gives them a better job opportunity will encourage the promotion of better health. I certainly would hope so.

But there are many other things that encourage the [147] promotion of better health. And as far as the classified advertising is concerned, I simply cannot find that they are—they meet the standard and that they are substantially related to the purpose of the College.

A closer question is presented on the question of the other advertising.

The question being whether the advertising activity serves the purposes of the organization.

And what has been proposed is that the advertising does that by educating the members who will read the editorial content and then will have an opportunity to also read the advertisements, and that would provide them information.

There's no doubt that advertising has educational value. All advertising has educational value.

But in this case there was really no showing that the advertising as a whole as published in the journal is related to the purposes of the organization, and that is to provide what we conceive to be a broad education of the members.

Advertising teaches certain things. There are things that the advertiser wants the reader to learn.

Advertising, by the way, by the way it is operated, is dependent upon the advertiser as to—a large extent as to the content, although the journal does exercise other [148] annals—journal does exercise some control.

But more importantly, it is really in the province of the advertiser as to whether or not the content of the advertising copy is a balanced showing of the—or a balanced presentation of what is available in the—in medicine.

One of the witnesses talked about the possibility of comparing advertising copy with the editorial content of the journal. But of course there's no assurance that if something is mentioned in the journal that—or particular products mentioned in the journal that will also be—appear in front or in the back in advertising. It depends a lot—great deal upon the budget of the organization that is producing the device or the drug whether it chooses to advertise, whether it likes to advertise in this particular journal, or—and such things.

Of course the journal could include lists of all available drugs and it could include advertising for its members free of charge if it chose to do so, if one could maximize availability of that kind of information; but of course it's not required to do so. It can consistent with its own purpose sell advertising as a business and sell it as a—and make a profit on it.

But when it does so, it begins to look a great deal like any other business.

[149] The comparison of the advertising in the Annals with that in other journals show that they are very similar, that from what I understand from the stipulation the rate cards of the rates charged are very similar, they're based on competition and not on some attempt to give—to use the advertising portion of the journal to give a balance or broad spectrum approach, or to give the readers a broad spectrum of information.

It is run a great [deal] like a business, and it raises to some extent the concerns of competitiveness with non-tax exempt organizations, which originally prompted the imposition of the unrelated business income tax.

This is not to say that advertising does not provide some assistance to the reader. It—advertising always does.

The question is whether it is—it meets the statutory tests and the regulatory tests. I think it is important that there is a regulation on point—and that is regulation Section 115, 1.512A—or rather F, 1.512F, which dealing specifically with the sale of advertising in a periodical by an exempt organization.

Now, Plaintiff has pointed out some inconsistency between this regulation and the example given further on. I don't think that the tension, if it exists at all, is terribly great.

[150] In any case, we have a regulation. And the language of the regulation is clear. And the Commissioner of Internal Revenue has a good deal of [discretion], as we all know, in drafting regulations.

And even if I were otherwise inclined, absent regulation 2, to give Plaintiff benefit of a doubt, I think the regulation—from me. And I find—hold that the—both the classified and the nonclassified advertising is not related—not substantially related to the business of the tax exempt organization.

The second major issue is whether or not it is—oh, incidentally, I am not today reaching the question that—the position proposed by the Government, and that is that relatedness deals with the conduct rather than the product of the organization. It does not necessarily mean that I will—that I'm persuaded by the point. I think it's a very seductive argument.

I simply don't know right here sitting in court today where the argument would lead.

And I've read the briefs and I've thought about it, but I'm not prepared—today. It does not mean that I wouldn't accept it in a case, or maybe if I should write something I wouldn't accept in this case.

Since I'm convinced that even looking at product the organization—does not meet the relatedness test. I [151] am avoiding what I think is in a sense the easier—the argument that's easier to explain but I think more difficult in its implications.

And so I'm basically not required to rule on the suggestion of the Government.

I think it's a seductive point. I think it's—it has certain appeal, and [a] certain satisfying consistency about it.

But maybe it's a little too consistent. I just have to think about it.

In any case, I am not addressing it today, and I'm basing my ruling on the degree of relatedness, and I simply find it's not enough.

The other issue is—I said is convenience of the members.

I'm sorry to say neither side gave me much help with this, and this is not I would blame either side. I think both counsel really did a very, very fine job of briefing and presenting what are—what are difficult issues, and helping the Court have [unintelligible].

But we have on the one hand the D and L test on the part of the Government, and on the part of Plaintiff the hand in glove test. This is made just for this.

I'm going to have to—I have—and I'm going to [152]—well, basically that's—it is on that basis I will decide it.

First I will find the language of the statute.

Somebody happen to know what page of this—of the brief—

MR. HUFFAKER: I can provide the Court with a copy of the Code which has the statute.

THE COURT: Please.

MR. HUFFAKER: —provide the Court with Code 513-2.

THE COURT: Thank you very much.

So, I had it open, and I closed it, and—I was looking for the convenience section.

MR. HUFFAKER: A2, Your Honor.

THE COURT: Ah.

That section provides that even if something is unrelated trade or business it should not be taxed if it's carried on in the case of this type of organization or case of a college or university—if it's carried by the organization primarily for the convenience of its members, students, patients, officers or employees.

And then it goes on to speak of other things.

It seems to me that the only way that that section can be read is by identifying the convenience of the individuals involved in their capacity as they are defined in the statute. That a dormitory is exempt, I presume because [153] Congress in the legislative history, but because it satisfies a need that is related to the student as a student, or order to—presume to get to classes in time and to have whatever concerns parents may have about sending away students to college, it may—it is part of going to college, or part of the ability of many students to go to college and may involve being on campus in the dormitory.

It certainly relates to that student's—or the students' activity as students. It facilitates their interaction with the exempt organization, and in many cases it may attract students—availability of on-campus housing attracts students that otherwise might not be there.

The test cannot apply to the convenience of people as people or in some other capacity.

This—the example was discussed about providing entertainment for students on campus. Unless it was somehow related to the function, the educational function of the campus, it seems to me would not—it would not be—the convenience test would not be met because entertainment is not part of the relationship between the student and the university.

And similarly—I mean it's for—certainly for the students' convenience but not for the convenience of the student.

I've racked my brain trying to figure out what it [54] is that the convenience for a member of the American College of Physicians—what membership involves and what the con-

venience for the member might involve for purposes of this section.

It cannot involve, obviously, convenience of the member as person. So, personal ads and the like, doctors are no different from other individuals, insofar as they are—certainly not by virtue of their membership in the American College are they any different with respect to their personal wants and needs.

Similarly, and that is a much closer point, the question of convenience cannot relate to their status as members of the profession.

The fact that they are members of the profession is a separate status from the member as—their members—their membership in the College.

And the many ads that might promote—advertisements that might promote their—that might be convenient to them as members of the profession, such as providing employment opportunities, such as providing teaching opportunities and the like, but would not necessarily make it easier for them to carry out their functions as members, whatever those functions may be at any one particular time, or that would be related to their status as members.

I have looked at one issue of Annals, and I have [155] frankly not looked at any of the others. You all have seen I've taken one with me.

I was not able to find any advertisement in here that related to the convenience of the members as members.

And I am willing to let counsel point to some in some of the other journals if they think that there are, but just to give examples of the things that I think are not, I'll add advertisements for drugs that certainly may assist members and may be convenient for members in—as professionals, but they really have no direct relationship on their status as members of the College. They don't in any way make it easier to perform the function of its members or attend membership functions or the like.

The—so, I thought all the glossy ads would not fall in that category. And although this was not an issue that was addressed as—certainly let Counsel point to some nonclassified ad—but might.

Nor was I able to see anything in the classified ads that related to anything other than the members' status as professionals.

And of course a professional status is very close to the status—or a person's status as a professional is very close to his status as a member of the professional organization related as a profession.

But there is a difference.

[156] And just as one can be a citizen and be a student and be a voter and be a member of the city council all at the same time, and all of those things are different, one can be many things, and only insofar as the physicians' functions as a member of organization are implicated would advertisements be for the convenience of the member under that section.

Therefore, I rule for the Defendant on that issue as well.

And I rule that—having ruled for Defendant on both issues, I find that the Plaintiff shall not prevail.

Are there any questions, any clarifications? I will before I go—if I need to, I will go through and answer the questions—Plaintiff, but before I do that, is there anything that counsel would like to ask or say or suggest at this point?

I'm willing to entertain.

I will file this, incidentally. This has been—this is Plaintiff's Statement of Issues in Dispute. And I will file it. But I will now refer to it in—I want to make sure that I've answered everything that's on here since—so, I've asked that the question be posed to me.

Question 1 is not capable of answering—being answered yes or no. This is an either/or question.

The answer to Question number 1 is unrelated [157] business income.

This is a legal issue number 1.

And the second question is: Can the income from advertising in a professional journal published by an organization described as a Section 501C3 of—be excluded from ordinary business income under the convenience of the members provision of Section 513A2?

And the answer is not in this case. I really would not want to rule in every case for all time.

Thank you.

This is now the taxable issues.

One, [does] the continuing updating of the knowledge of physicians concerning medical products and services available for patient care contribute importantly to the performance of Plaintiff's exempt functions.

Of course it does. And that's what—and that's what the editorial content of the—of the—of the Annals is about.

When it comes to advertising content, however, the answer to that is no.

Two, does Plaintiff's advertising contribute importantly to the continual updating of the knowledge? Well, that's a second question. The question (sic) to the first one is yes.

Two, does Plaintiff's advertising contribute [158] importantly to the continual updating of the knowledge of physicians concerning medical products and services available for patient care?

The answer is no.

And to question number 3 on page 3 is: the advertising Annals of Internal Medicine or impression thereof carried on primarily for the convenience of Plaintiff's members.

And with a footnote that I have not looked at every advertisement in every one of the journals presented into evidence, and on the basis of finding the first one, the one that I did look at, as being representative, the answer to that is no. It is not being carried on for the convenience of Plaintiff's members as members.

If there were some which met the standards of being carried on for the con—primarily for the convenience of Plaintiff's members as members, we'd have to decide the apportionment issue, or whether there were an apportionment.

And I simply don't—I will—consider that point.

I think that wraps up the case.

I'm really in a quandary as to whether I should write something on this or I should just rely on my—on my oral ruling and let it go at that. And I'm sure the [159] Appellate Court, if there should be an appeal, will be able to review the transcript.

Is there any preference on the part of either of the parties?

I may do what I plan to do anyway, but I would like to know what the parties think.

I—Mr. Huffaker?

MR. HUFFAKER: I think it fair to regard the issue that Your Honor has examined of the Annals as representative.

I don't see any reason to believe that if there were anything else that Your Honor hasn't found that it would be of sufficient size not to fall out under a de minimis rule.

So, first of all, I don't think that should hold things up.

Obviously, we can't make the judgement on appeal—

THE COURT: Oh, no, no. I certainly wouldn't want to—

MR. HUFFAKER: —[unintelligible].

THE COURT: Let me tell quite frankly, I—I guess like many others I'm backed up, and I don't think I could get an—I can get a judgement out very quickly. If I were to write on the subject, it would obviously take somewhat longer.

[160] I don't know what the party's situation is. I—those are the concerns. I may wind up doing what I'm going to do anyway after I check my workload, but I wanted to hear what the parties' preferences were given those two competing concerns.

MR. HUFFAKER: Well, we have, as I understand it, some rather novel issues on convenience where Your Honor has not much guidance from the statute—the regulations in arriving at conclusion.

And secondly, we have the question in the—of Your Honor's determination concerning the relatedness of the advertising, because it does contribute—it's how much, how important. And it really comes down to the Court determining that the expert witnesses didn't—weren't sufficiently persuasive.

I don't know frankly offhand whether that is a sufficient ground to support an appeal or not.

THE COURT: I really was not—I was not trying to corner you on that.

MR. HUFFAKER: Well, that's—

THE COURT: My feeling on appeal is we all need guidance from upstairs, and I was basically wondering whether, given—if I write something, it will take longer to get a piece

of paper from me. Would you have any preference? And I'm not sure whether you wouldn't—you'd be able to [161] make an appeal quicker if I just sent a judgment. If that's the way you—to do.

On the other hand, if I took the time to write something, it would be a while longer—in the writing. And it may make no difference to you at all. You may have preference. And that's all I was really asking.

You may have no preference. I don't mean to put you on the spot.

MR. HUFFAKER: I would think that it would be much more helpful if there is to be an appeal to have an opinion.

THE COURT: That's fine. I mean, that's—

Mr. Rapp?

MR. RAPP: I do have an opinion. And my opinion, Your Honor, is that—

THE COURT: Are you going to give it to me?

MR. RAPP: —to suggest—yes. Free of charge, my opinion is that the Court should write an opinion.

As we mentioned earlier, there are at least—

THE COURT: Oh, —had an opinion—

MR. RAPP: Ah. No. I—

THE COURT: Okay. No, I—

MR. RAPP: The—I—as we mentioned before, there are at least two cases pending in this court already with substantially similar issues involved. And this is a case of first impression in the federal court. So, this would be [162] the first decision on the subject.

For that reason, a written opinion would be of extreme value to the Government.

THE COURT: So, we have a definite yes and a mild yes that I ought to write something.

Okay. I really have to check my—what's going on upstairs—I do like to ask the parties. Once in a while I just rule, rely on the written transcript when things—but the views of parties are important.

So, chances are I will probably write something.

Once again, I want to commend Counsel, not only for what I think has been an excellent presentation of the facts and the law, but also for being what I thought was unusually co-

operative and both courteous to each other, and—and it's really been a great pleasure dealing with both of you individually, together, seeing you interact.

Thank you very much.

THE CLERK: Court is adjourned.

(Whereupon, at 4:45 p.m., the hearing was concluded.)

[Plaintiff's Exhibit P-13]

ANNALS OF INTERNAL MEDICINE

[July 1977]

ADVERTISING AND OUR JOURNAL

[114] The uncertain romance between scholarly journals and the drug industry has long been like a marriage of convenience between partners who become friends ultimately, not because they were fond of each other originally, but because they needed each other.

The fact is that without the financial support of drug houses the *Annals of Internal Medicine* would cost a full-rate subscriber about $37.00 per year instead of $25.00 (and members of the College an increase in dues to $92.00 per year). This fact also applies to all other peer-review journals in clinical medicine. This is what justifies the incorporation of drug advertising in this journal. We are pleased to have this support from advertisers. Without advertising income, the cost of this journal would be beyond the reach of many who need it most, especially students in their clinical years and house officers.

Much has been spoken and written about the impact of advertising on prescribing habits of American clinicians. I do not know how one can accurately assess its effects. The drug industry must believe that this advertising is effective; if it were not, their hard-nosed accountants would probably put an end to it.

Drug advertisements in peer-review journals are a vital part of continuing pharmacologic education. Since the Food and Drug Administration has imposed guidelines that limit advertising copy to content that does not extend beyond package-insert information, "truth in advertising" is not an issue. The eye-catching quality of the advertisement may determine whether the reader pauses at the page or passes it. Individual judgments will differ on an advertisement's for-

mat and taste, but the written content is guaranteed to be factual.

The considerable literary and promotional talents of advertisement writers are brought to bear so that a busy clinician can catch the gist of the message—in a flash. No one, including the advertisers, expects that any good clinician will leap up and dash off reams of prescriptions on the basis of an appealing advertisement. But it does serve an alerting function: to provoke the physician's interest to the extent that he will look further into the drug's use by reading a contemporary pharmacology text, or ask his librarian to reproduce a few recent references from current journals, or look it up in *The Medical Letter* or *AMA Drug Evaluations*. This catching of the reader's attention is a short but important step down the trail of education on drug use to more enlightening [*sic*] prescribing.

An old restless ghost needs to be put to rest. Do drug companies attempt to influence the publication policies of peer review journals? I ask you to conjure up the image of *anyone* trying to approach a Franz Ingelfinger or an Ed Huth or a Bob Moser on such a matter. It is "unconjurable"; it does not happen. Of course the drug houses, and [115] some other readers, may welcome some articles less than others, and they do not hesitate to express their dissent. They get their views into the rough and tumble exchange of "Letters to the Editor," furthering the enlightenment and entertainment of us all.

Some clinicians do not scan advertisements. Some purists would rather pay the $37.00 and have journals abandon drug advertisements; this constituency is so small that few medical journals could survive on this basis. But most of us scan advertisements to see if some new product has surfaced that somehow has managed to escape our ritualistic perusal of favorate journals. Often we are surprised to find that a new product has come to the American scene. Perhaps it is one that has already thrived in Britain for a few years and just recently has emerged from the fine-grinding mills of the FDA. Or it may be an entirely new drug that has been receiving rave notices in journals we do not read.

What about the "stacking" rather than "interspersing" of advertisements? As an old editor and older reader of medical journals, I have not been bothered by interspersing of advertisements, but in fact it does irritate most serious journal readers. It does tend to disrupt continuity of attention and thought. The set of mind in reading serious science should not be tampered with. Most of us scan the advertisements fore and aft, as a matter of course, usually before dipping into the well of original contributions. This is a part of the technique of reading a medical journal for most of us.

The "uncertain" romance has become less uncertain through the years, and the marriage of convenience has become more of a marriage of mutual regard and help. So we thank our old friends for their support, (*see* below) and we welcome any new friends in the drug industry to join the scholarly pages of *Annals of Internal Medicine.* (ROBERT H. MOSER, M.D., F.A.C.P.; *Executive Vice-President, American College of Physicians)*

Supreme Court of the United States

No. 84-1737

UNITED STATES, PETITIONER

v.

AMERICAN COLLEGE OF PHYSICIANS

ORDER ALLOWING CERTIORARI.

[Filed July 1, 1985]

The petition herein for a writ of certiorari to the United States Court of Appeals for the Federal Circuit is granted.